Editor's note: Appealed -- reversed sub nom. John W. Savage v. Hodel, Civ.No. 83-1838 (D.Colo. Nov. 19, 1985); dismissed as moot (settlement), No. 86-1090 (10th Cir. Aug. 12, 1987), 826 F.2d 948

UNITED STATES
v.
ENERGY RESOURCES TECHNOLOGY LAND, INC., ET AL.

IBLA 83-583 Decided June 30, 1983

Cross appeals by contestant and contestees from the April 15, 1983, decision of Administrative Law Judge Michael L. Morehouse declaring 168 oil shale placer mining claims null and void. Colorado Contest Nos. 689, 690, 692, 694, 695, 696, 697, 698 and 699.

Affirmed as modified in part, reversed in part.

1. Equitable Adjudication: Generally -- Estoppel -- Mining Claims: Assessment Work -- Mining Claims: Contests

   The Department is not estopped from contesting the validity of a mining claim on a charge of substantial noncompliance with the requirement for performance of annual labor mandated by 30 U.S.C. § 28 (1976) merely because the claimants relied on previous official declarations that the Department had no authority to enforce compliance with the statute, and were thereby misled to believe they could ignore it with impunity and still demand the benefits of the General Mining Law.

2. Mining Claims: Assessment Work -- Mining Claims: Determination of Validity

   The accomplishment of the minimum of the $500 worth of improvements on a mining claim, as required by 30 U.S.C. § 29 (1976), neither terminates nor substantially satisfies the requirement of 30 U.S.C. § 28 (1976) that $100 worth of labor be performed on the claim each year until patent issues. Nor is there substantial compliance with sec. 28 where

for considerably more than half of the total number of years in which the performance of annual labor was required, none was done.

3. Mining Claims: Determination of Validity -- Mining Claims: Discovery: Geologic Inference

A discovery of oil shale can be based upon a surface exposure or outcrop of even "lean" kerogen content provided that, based upon geologic inference, such exposure reasonably may be followed within the limits of the claim to rich deposits at depth. Unless part of the Parachute Creek member of the Green River Formation, however, rock which will not yield 3 gallons of oil per ton cannot be regarded as "oil shale," as distinguished from other common forms of oil-bearing rock, and surface exposures of such material will not constitute a discovery of oil shale.

4. Administrative Procedure: Adjudication -- Mining Claims: Assessment Work -- Mining Claims: Contests -- Rules of Practice: Government Contests

In a government contest of an association placer mining claim on a charge of nonperformance of annual labor as required by 30 U.S.C. § 28 (1976), each co-owner of the claim is an indispensable party to the proceeding, and a failure to properly serve and join each such party is fatal to the action, and a decision rendered therein purporting to void the fractional interests of those claimants who were properly served is a mere nullity and of no effect. Union Oil Co. of California (Supp.), 72 I.D. 313 (1965) is overruled and rescinded on this point.

5. Administrative Procedure: Substantial Evidence -- Evidence: Sufficiency -- Mining Claims: Contests

Where in a government contest of certain association placer mining claims the contestant charges and proves prima facie

> that specific 10-acre tracts are non-mineral in character and thus subject to exclusion from the claims, a finding by the Administrative Law Judge that such tracts are mineral in character will be reversed on appeal where the basis for that finding was mere unsupported conjecture by an expert witness that there is "a strong possibility" that beds of rich oil shale underlie those tracts. Such evidence is insufficient to rebut the prima facie showing by a preponderance of evidence.

Union Oil Company of California (Supp.), 72 I.D. 313 (1965), overruled and rescinded in part.

APPEARANCES: Donald L. Morgan, Esq., Henry J. Plog, Jr., Esq., Sally K. Rich, Esq., Washington, D.C.; Richard W. Hulbert, Esq., New York, New York; James Clark, Esq., William D. Maer, Esq., Bruce Pringle, Esq., H. Michael Spence, Esq., Jaques S. Ruda, Esq., Denver, Colorado; John W. Savage, Jr., Esq., Rifle, Colorado, for the various contestees/appellants; Lyle K. Rising, Esq., Denver, Colorado, for contestant/appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

The Bureau of Land Management ("BLM"; "Contestant/Appellant"), initiated nine separate contest proceedings to determine the validity of 168 oil shale placer mining claims covering some 25,000 acres in the Piceance Basin in northern Colorado. 1/ The contests were consolidated and heard by Administrative Law Judge Morehouse, who, by his decision of April 15, 1983, held that all of the claims are null and void for failure of the claimants to comply substantially with the statutory requirement for the performance of annual assessment work, as required by 30 U.S.C. § 28 (1976).

He further held that 130 of the 168 claims were also null and void for the additional reason that there was no qualifying discovery of a valuable deposit of mineral within the limits of each of those claims, as required by 30 U.S.C. § 22 (1976). He found that the remaining 38 claims, although void for nonperformance of assessment work, were supported by a qualifying discovery of oil shale as of February 25, 1920 (when oil shale became non-locatable), and at present.

Judge Morehouse also held that the decisions rendered in various Government contest proceedings circa 1929 (holding that certain of the subject claims were null and void for nonperformance of annual labor and abandonment) were ineffective because of procedural deficiencies. As Judge Morehouse recognized, this holding is contrary to Union Oil Company of California (Supp.), 72 I.D. 313 (1965), which held that certain of those early contest decisions

1/ See appendices to the Administrative Law Judge's decision for contest numbers, claim names, claimants, and representative counsel appearing before him.

were efficacious in part, notwithstanding the procedural deficiencies, to the extent that they served to invalidate the interests of those claimants who were properly served.

Additionally, Judge Morehouse refused to recognize the contestees' assertion that the United States was estopped from invalidating mining claims for substantial nonperformance of assessment work because of previous Departmental declarations of official unconcern, upon which the claimants had relied to their detriment. Likewise, Judge Morehouse rejected the contestees' defense of laches against the charges of nonperformance of annual labor based on the alleged undue delay in bringing that charge.

Finally, Judge Morehouse found that certain 10-acre subdivisions on the Pollack Nos. 1, 2, and 3 claims are mineral in character, contrary to the contest complaint.

The contestees have appealed jointly. BLM has also appealed.

This Board will briefly address and dispose of the principal issues and contentions raised by each appellant in turn, as follows:

Issues Raised by Contestees/Appellants

[1] Assessment Work - It is beyond contradiction that for many years it was the position of this Department, as expressed by regulation, decisions, and other official pronouncements, that failure to perform the annual assessment work required by 30 U.S.C. § 28 was not a ground upon which the Department could contest the validity of a claim, but, rather, was solely a matter between rival claimants. The Department had adopted this position based upon its understanding of what the United States Supreme Court had said in Wilbur v. Krushnic, 280 U.S. 306 (1930), and Ickes v. Virginia-Colorado Development Corp., 295 U.S. 639 (1935). The lower courts were similarly misled. See, e.g., Gabbs Exploration Co. v. Udall, 315 F.2d 37 (D.C. Cir. 1963). This perception was altered radically by the Court's subsequent explanation of the matter, delivered in Hickel v. The Oil Shale Corp., 400 U.S. 48 (1970) (TOSCO), which limited the application of the Krushnic and Virginia-Colorado decisions to those instances where there has been "substantial compliance" with the statutory requirement, and held "that the Department of the Interior had, and has, subject matter jurisdiction over contests involving performance of assessment work;" and "that token assessment work, or assessment work that does not substantially satisfy the requirements of 30 U.S.C. § 28, is not adequate to 'maintain' the claims within the meaning of § 37 of the Leasing Act." 400 U.S. at 57.

Contestees/appellants contend that the Department is estopped from now asserting charges that there was a failure of substantial compliance with the statutory requirement. They assert a general reliance on the Department's declarations over a long term of years to the effect that it had no responsibility for the enforcement of the requirement for annual labor, and that claims could not be invalidated on that basis. Judge Morehouse rejected that contention on the basis of this Board's holding in United States v. Bohme, 48 IBLA 267, 325, 87 I.D. 248, 277 (1980) ("Bohme I"). However, in his decision he did make specific findings of fact that the several claimants had

knowledge of the Department's previous position concerning its lack of authority and responsibility to enforce the assessment work requirement, and relied thereon to their detriment.

Their plea of estoppel cannot be sustained. We can find no evidence that the Department, or any other authority, ever declared that the law did not require the performance of annual labor. Clearly, the statute did so require, and the claimants are properly charged with knowledge of what the statute demanded of them. What they relied on were the mis-statements by the Department that it was powerless to enforce the requirement. Because they shared the Department's misconception of its function, and thus believed it impotent to enforce compliance, they obviously were led to believe that they could willfully disregard the statutory mandate with impunity, particularly as the passage of the Mineral Leasing Act had eliminated the possibility that the claims could be relocated by adverse claimants. They knew what the General Mining Law required, and they deliberately chose not to comply with its requirements, "in complete defiance of the 1872 Act," 2/ but now they claim entitlement to the benefits of that law nevertheless. A poorer case for the invocation of an equitable defense can hardly be imagined. See Bohme I, supra, 48 IBLA at 324-25; 87 I.D. at 277-78.

[2] Contestees/appellants contend that the amount of assessment work performed "on or for the benefit of" each of the claims at issue constitutes "substantial compliance" with the requirement that "on each claim * * * not less than $100 worth of labor shall be performed or improvements made each year." We must preface our discussion of this contention with a clarification of our discussion in Bohme I concerning "substantial compliance," which has been misunderstood by appellants and by Judge Morehouse. Our rejection of the standard formulated by Administrative Law Judge Sweitzer that a "reasonably persistent effort" would suffice included our observation "that TOSCO holds that in order to maintain a claim in compliance with the mining law of 1872, $100 worth of assessment work must be done each year. 400 U.S. at 54." Bohme I, 48 IBLA at 317; 87 I.D. at 273. This infelicitously-phrased expression, when read out of context, conveys the impression that the Board was holding that a failure to perform assessment work each year would constitute a failure to "substantially comply" with the law. This was not the Board's holding, as should have been revealed in the next paragraph of the decision, where we noted, as had the Supreme Court in TOSCO, that both Krushnic and Virginia-Colorado involved nonperformance for only a single year. Obviously, the TOSCO Court did not regard a 1-year lapse as a "substantial" failure of performance, and the Board fully understood this. However, the TOSCO Court did expressly state that the holdings in Krushnic and Virginia-Colorado provide only a "narrow ambit" within which cases concerning the time, amount, and nature of assessment work might be fitted. 400 U.S. at 58. Accordingly, in Bohme I this Board held only that a standard which construed a "reasonably persistent effort" as the equivalent of "substantial compliance" impermissibly and erroneously liberalized the Court's holding in TOSCO. We adhere to that holding, and the decision below is modified accordingly.

2/ Quotation from the opinion of the Supreme Court in TOSCO. 400 U.S. at 56.

Contestees/appellants urge several arguments in support of their contention that the "substantial compliance" requirement of TOSCO has been met with regard to these claims.

First, they assert that the accomplishment of the $500 worth of labor for each claim as a prerequisite to the issuance of a patent, required by 30 U.S.C. § 29 (1976) constitutes "substantial compliance" with 30 U.S.C. § 28 (1976), which requires the performance of $100 worth of labor during each year on each claim until a patent has been issued. The Board will resist the temptation to reject this assertion out of hand as frivolous. These are two separate requirements which are only tangentially related. That is, while it is true that the requirement of section 29 can be satisfied by the performance of annual labor pursuant to section 28, the reverse is not possible. If it were, a claimant could do $500 worth of improvement on his claim during the first year of location -- before the obligation to perform assessment work had even accrued -- and then hold the unpatented claim for the next 50 years without ever performing any of the annual assessment work required by section 28. Clearly the 1872 Act did not contemplate that once a claimant had accomplished $500 worth of work he would thereafter be excused from any further work. The Congress must have been aware that many claims would not be patented within 5 or 6 years after their location, and yet it required in section 28 that the annual labor be performed on each claim, "until a patent has been issued therefore * * * during each year." Nothing could be more plainly stated. None of the "authorities" cited by the appellants support their contention, and we know of none which has ever stated that $500 worth of improvements terminates or substantially satisfies the claimant's obligation to perform annual assessment work thereafter on his unpatented claim.

Next, contestees/appellants contend that the amount of assessment work performed for the claims at issue is sufficient to satisfy the "substantial compliance" doctrine of TOSCO. However, as we understand the evidence in this case, during the period from the first year following location until 1981 (or 1958 in the case of Mullins Nos. 13-20), there is not a single instance where compliance with section 28 even approached 50 percent. That is, for considerably more than half of the total number of years in which the performance of annual labor was required on each claim, none was done. Although we have not attempted to define "substantial compliance," this Board has no difficulty whatever in recognizing in this record that there has been substantial noncompliance with the requirement. Where the extent of noncompliance exceeds the extent of compliance, the noncompliance is obviously more substantial. The "compliance" with which we are concerned here is the statutory duty to perform work each year, and not the accomplishment of a thing which has substance. Therefore, if a claimant has performed work which results in a "substantial" improvement, such as the opening of a mine shaft, but then fails to perform any annual labor for the ensuing 30 years, the "substantial" thing that has been accomplished may not be equated with "substantial compliance" with his statutory obligation to perform a minimal amount of work each year. Given the "narrow ambit" ascribed by the TOSCO Court to the holdings in Krushnic and Virginia-Colorado, each of which involved nonperformance for only a single year, this Board has no difficulty in affirming Judge Morehouse's conclusion that none of these claims is supported by "substantial compliance" with 30 U.S.C. § 28.

Appellants also argue that TOSCO was wrongly decided by the Supreme Court, an argument which this Board may not entertain.

In a similar vein, appellants argue that Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959), was wrongly decided, and that it is the Government which bears the ultimate burden to prove nonperformance of assessment work rather than simply to make a prima facie showing of substantial nonperformance. This contention is likewise beyond the jurisdiction of this Board. We note, however, that the Court of Appeals for the D.C. Circuit was neither the only nor the last court to hold that it is the mining claimant who has the ultimate burden of proof. See, e.g., United States v. Springer, 491 F.2d 239, 242 (9th Cir.), cert. denied, 419 U.S. 834 (1974); United States v. Zweifel, 508 F.2d 1150 (10th Cir.), cert. denied sub nom. Roberts v. United States, 423 U.S. 829 (1975).

Further, appellants assert that the contests' charges of nonperformance of assessment work are barred by the resumption of work prior to the initiation of the actions. This contention was addressed and rejected by this Board in United States v. Weber Oil Co. (Weber), 68 IBLA 37, 54, 89 I.D. 538, 546 (1982), noting that the TOSCO decision had disposed of that issue. We adhere to our holding there.

Appellants' argument that these contests are barred by laches was likewise addressed and rejected by the Board in Bohme I and Weber, again observing that the TOSCO decision precluded it. We adhere to our previous holdings in those cases.

Appellants' arguments concerning the admissibility, weight, and quality of the evidence adduced by the contestant to show substantial nonperformance of assessment work were considered by Judge Morehouse and answered in his decision. We affirm.

[3] Discovery - This Board has reviewed and analyzed exhaustively the factual circumstances and law relating to qualifying "discovery" of "valuable" deposits of oil shale in United States v. Bohme, supra, 51 IBLA 97, 87 I.D. 535 (1980) ("Bohme II"), and United States v. Weber, supra. Those decisions endeavored to apply the rule in Freeman v. Summers, 52 L.D. 201 (1927), as sustained by the Supreme Court in Andrus v. Shell Oil Co., 446 U.S. 657 (1980). In Bohme II we quoted from Freeman v. Summers, supra, as follows in part:

> * * * In order to warrant that proceeding, he must have discovered mineral in such situation and such formation that he can follow the vein or the deposit to depth, with a reasonable assurance that paying minerals will be found. In other words, the discovery of an isolated bit of mineral, not connected with or leading to substantial prospective values, is not a sufficient discovery; * * * [i]t is sufficient * * * if he finds mineral in a mass so located that he can follow the vein or the mineral-bearing body, with reasonable hope and assurance that he will ultimately develop a paying mine. [Italics supplied.] 52 L.D. at 204, 205.

87 I.D. at 540.

Accordingly, in Bohme II we stated:

> As we read Freeman v. Summers, an exposure of the Parachute Creek member, even though of limited extent, can be geologically inferred to embrace sufficient quantity of high grade oil shale so as to constitute a valuable mineral deposit. We thus perceive one of the issues before this Board is whether contestees' claims contain an exposure of the Parachute Creek member that can be followed to depth with a reasonable assurance that paying minerals will be found.

Id. at 540.

In Weber, we summarized the geologic evidence as follows:

> The general area in which these claims are situated is known as the Piceance Creek basin. There are two relevant independent geologic formations in this area, the Green River formation and the Uinta formation. The Parachute Creek member, which contains rich oil shale, is part of the Green River formation. The Uinta formation (formerly called the Evacuation Creek member and formerly believed to be part of the Green River formation) is a thick layer of generally oil-barren sandstone. It is as much as 1,400 feet thick and overlies the Green River formation. Thus, in this area, the Parachute Creek member is generally covered by a vast amount of oil-barren sandstone.
>
> The Parachute Creek member does outcrop, totally uncovered by the barren Uinta formation, at places where erosion has cut through the Uinta formation, such as along streams and drainages, thereby exposing the rich oil shale of the Parachute Creek member. As discussed below, some of the present claims contain such outcrops, and there is no question that there has been "discovery" on these claims.
>
> However, the principal surface deposits of oil shale found in the Uinta formation are not outcroppings of the rich Parachute Creek member, but are instead "tongues" of marlstone of inferior quality. Although these tongues of lean marlstone are thought to meet the Parachute Creek member at depth, they do so at great lateral distance from the surface outcroppings, on the order of tens of miles. Thus, these tongues of marlstone cannot be followed to depth to the rich deposits of the Parachute Creek member within the limits of any mining claim. Inasmuch as these claims are placer rather than lode, no extralateral rights appertain to them, and the existence of the marlstone outcrops affords no rights to deposits outside the limits of the claim. Accordingly, they do not meet the requirements of Freeman v. Summers/Bohme II.

Id. at 68 IBLA 45, 89 I.D. at 542.

In the instant case Judge Morehouse applied these tests (and others, discussed infra) and concluded that 130 of the claims were not supported by a qualifying discovery, whereas the remaining 38 claims were.

Contestees/appellants argue at length that in applying the language quoted above from the Freeman v. Summers decision the Board has erred, because it is not the words in that decision which matter, but, rather, it is their interpretation of the explanation of that decision given by its draftsman (First Assistant Secretary Finney) to the Congress, which should control. Appellants charge that the Board, in following the language of the decision, has "re-written" the decision. It appears to the Board that the converse is true; that appellants rely on the language of the Freeman decision to the extent that it aids their case, but would expurgate any language from the decision which would support the contestant's case, and substitute their understanding of Finney's verbal explanation of the decision in its place. 3/ The Board is well aware of the importance of the 1930-31 Congressional committee hearings, and certain of the testimony given then, to the holding of the Supreme Court in Andrus v. Shell Oil Co., supra. We note, however, that the holdings was, in the words of the Court:

> * * * We conclude that the original position of the Department of the Interior, enunciated * * * in Freeman v. Summers, is the correct view of the Mineral Leasing Act as it applies to the patentability of those claims. [Footnote omitted.]

The language from Freeman v. Summers which the Board quoted in Bohme II and Weber, and again, in part, above, to which appellants so strenuously object, is contained not only in the text of the decision at 52 L.D. 205, but is repeated in the first headnote at page 201, indicating that it is a principal holding of the Freeman decision. We are perfectly persuaded that our application of the standard of discovery enunciated there is obligatory and controlling, and that Judge Morehouse correctly was guided by it in the instant case.

Again, the Freeman standard requires that a claimant "must have discovered mineral in such situation and such formation that he can follow the vein or deposit to depth with reasonable assurance that paying minerals will be found." Judge Morehouse found that 130 of the subject claims do not have surface outcrops or exposures of the Parachute Creek Member of the Green River Formation. He did find that on each of those claims there were outcrops or exposures of generally lean oil shale, but that these were "tongues" of the Green River Formation, not of the Parachute Creek Member of that Formation, none of which can be "followed" to the Parachute Creek Member within the limits of any claim. Such an exposure must be regarded, in the language of Freeman, as "an isolated bit of mineral, not connected with or leading to substantial prospective values," and, therefore, "is not a sufficient discovery." Finney and the original locators may have sincerely believed that the finding of any surface exposure of material which could be

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3/ Although Finney was First Assistant Secretary of the Department, the decision in Freeman v. Summers was not his decision. He was merely its draftsman. The decision was that of Secretary of the Interior Work, who exercised plenary supervisory authority. Although Finney was a far more prestigious person than a judge's law clerk, the analogy of a law clerk testifying to "explain" what he intended in a decision drafted for his judge is inescapable.

identified as "oil shale" provided adequate evidence that a miner "could nevertheless proceed with assurance [that] at a reasonable depth he would intersect the several rich shale-bearing beds therein," as Finney explained the Freeman decision. However, the evidence of the geology of the area is persuasive that this simply is not so. While the Board is bound by Andrus v. Shell Oil Co., supra, to adhere to the legal standards of discovery articulated in the Freeman decision, we are not obliged to accept its draftsman's factual misconceptions circa 1931. If Finney's understanding of the occurrence, disposition and quality of the oil shale in the Piceance Basin were indeed conclusive and binding upon the parties, this Board, and the courts, then all of the reams of geologic testimony, reports, maps, and charts adduced in this case and the Bohme and Weber cases were simply irrelevant and immaterial, and thus inadmissible, and represent a monumental waste of the time and resources of all of the many people concerned.

The object of these contest proceedings is, first and foremost, to receive evidence on disputed issues of fact. This Department is under the mandate of the Court of Appeals by its order of remand to develop all factual (and legal) issues by the process of administrative hearings. Oil Shale Corp. v. Morton, Civ. Nos. 74-1344-47 (10th Cir. Sept. 22, 1975), cert. denied, 426 U.S. 949 (1976).

In order to qualify as valid claims, eligible for patent, it must be demonstrated that each claim was supported by a qualifying discovery of a valuable deposit of mineral within its own boundaries on February 25, 1920 (when oil shale ceased to be locatable), and at the present time. Because, unlike other minerals, a discovery of a valuable deposit of oil shale may be based upon the geologic inference arising from the finding of exposures even of "lean" non-commercial oil shale, the "geologic inference" must necessarily be drawn from the prevailing state of geologic knowledge. Any alteration or enhancement of the understanding of the geology could alter the inferences which may be drawn from particular geologic circumstances. Thus, what might have legitimately been regarded as a qualifying discovery of oil shale based on geologic inference 50 or 65 years ago may not be so viewed today. Conversely, ignorance of actual geologic conditions during 1916-1920 might have precluded claimants from effecting a discovery based on geologic inference in places where today, based upon better information, the inferred presence of a valuable deposit would be geologically appropriate.

Contestees/appellants argue earnestly that the understanding of the geology of this region has not altered since the location of these claims in any way significant to the accomplishment and recognition of the discoveries asserted for each. Contestant/appellant (BLM) vigorously disputes this, maintaining that the state of geologic knowledge of the area at the time the claims were located was such that no legitimate discovery based on geologic inference was possible.

In Bohme II the Board addressed the issue of oil shale discoveries based upon geologic inference, stating, "As we read Freeman v. Summers, an exposure of the Parachute Creek member, even though of limited extent, can be geologically inferred to embrace sufficient quantity of high grade oil shale so as to constitute a valuable mineral deposit." 87 I.D. at 540. We also

held that the physical exposure of that member is the sine qua non of a discovery, and where claims did not contain exposures of mineral prior to February 25, 1920, upon which claimants could rely to geologically infer the existence of richer beds at depth, there was no discovery effected, even though core drilling after 1920 disclosed the presence of oil shale on the claims. 87 I.D. at 543.

In Weber, supra, we noted that exposure of a surface deposit of lean oil shale is inadequate to demonstrate the existence of rich deposits at depth where the exposure is not of the Parachute Creek member and there is no evidence showing that the exposure can be followed to rich deposits at depth. 68 IBLA at 46.

Weber also found that rock which, upon destructive distillation would yield less than three gallons per ton (3 gpt) is indistinguishable from the ordinary shale or limestone in the earth's crust and therefore is not "oil shale." However, Weber did not declare that the mere finding of rock which would yield 3 gpt or more constitutes a discovery in and of itself.

As the contestee/appellants themselves point out, the term "oil shale" is a popular mis-nomer, as it is not "shale" and contains no petroleum oil, but rather kerogen in marlstone which is high in carbonate. John Donnell, identified as the recognized expert on the Green River formation, defined oil shale as follows:

> My definition of oil shale is a fine-grained sedimentary rock containing more than the average organic material in shales. The organic material is present as a solid hydrocarbon . . . . [As for] Green River oil shales, the material is not a shale. It is more properly termed as marlstone. It is high in carbonate. Ex. 251, p. 41-42.

He identified the solid hydrocarbon as being named kerogen. Ex. 251, p. 45. Moreover, he stated that "there should be some dividing point between what [oil] is present in the average shale or limestone in the earth's crust and what is present in true oil shale." Ex. 251, p. 499. The average amount of oil present in the earth's crust is 3 gallons per ton. Ex. 251, p. 499.

Geologists appear to have generally accepted that in order to classify a rock as oil shale, it must yield a certain minimum amount of oil upon destructive distillation. The 3 gallon per ton figure suggested by John Donnell has been adopted by this Board in Weber.

Contestees/appellants attack the Board's use of this standard as arbitrary and capricious. We willingly concede that it is arbitrary, but deny that it is capricious. The mere fact that a standard is established arbitrarily does not automatically invalidate it. A great many legal and legislative standards are set arbitrarily as a matter of simple necessity where it is impossible to set them precisely, but where a standard is needed nonetheless. John Donnell acknowledged that his 3 gpt figure was an arbitrary one, stating, "The figure that anyone uses is an arbitrary figure." However, his figure is the product of reason applied to knowledge, and cannot be characterized as "capricious" by any definition of that term. He testified

that other common rock averaged somewhere around 2 1/2 gpt, but that he did not use that as the cut off. Rather, he said, he used more than the average, arbitrarily setting the figure at 3 gpt because "there should be some dividing point between what is present in the average shale or limestone in the earth's crust and what is in the true oil shale." (Ex. 251, pp. 498-99).

The Board agrees that some standard is necessary for the definition and identification of oil shale, and that 3 gpt is reasonable, liberal, and minimal, as any lower standard would surely blur the distinction between "oil shale" and other forms of ordinary rock. Therefore, we adhere to our finding on this issue as discussed in Weber.

Judge Morehouse, in his decision, expressed his uncertainty concerning the application of the 3 gpt standard. One of the claims, the Emma No. 3, had a surface exposure of the Parachute Creek member, but assayed less than 3 gpt. However, in Bohme II this Board followed the language of Freeman v. Summers that, "It is sufficient * * * if he finds mineral in a mass so located that he can follow the vein or the mineral-bearing body * * *," in concluding that any surface exposure of the Parachute Creek member would constitute a discovery by geologic inference. The 3 gpt standard would apply to the finding of rock which was not part of the Parachute Creek member and could not even qualify as "oil shale." Judge Morehouse properly applied this concept in holding that the exposure of the Parachute Creek member on the Emma No. 3 constituted a discovery notwithstanding the assay of less than 3 gpt.

Issues Raised by Contestant/Appellant (BLM)

Assessment Work - BLM contends that Judge Morehouse erred in his finding numbered 27 on page 20 of his decision in stating that it was "* * * the Department's position during the period from 1935 to the early 1960's that annual assessment work need not be performed." Appellant correctly asserts that such has never been the Department's position, as we have held above and in Bohme I, 87 I.D. at 277, where we found that the Krushnic and Virginia-Colorado decisions did not deal with whether the law required the claimants to perform annual assessment work, but with whether the Department had the authority and responsibility to enforce compliance with the law, and whether the United States could be the beneficiary of their failure to comply. The decision of Judge Morehouse is modified accordingly.

Contestant/appellant also objects to what it terms Judge Morehouse's "overly generous findings as to the amount of assessment work credited to the contestees in the 1920's and 1950's." It alleges that certain of these findings are not supported by even a scintilla of evidence in the record, and that the Government adduced ample evidence that the work was not performed.

We confess to some bewilderment concerning the basis for Judge Morehouse's findings in this regard. It does appear that he was extremely liberal in his acceptance of unsupported self-serving assertions that work was performed in certain years despite contrary evidence. However, we are of the opinion that if he erred in this regard, the error was harmless. Even by giving the contestees the maximum credit possible for annual performance of work, they fall woefully short of even approaching what might be termed

"substantial compliance" with 30 U.S.C. § 28, as Judge Morehouse held and as we have affirmed, supra.

Discovery - Contestant/appellant challenges Judge Morehouse's findings of fact based upon his use of "unrepresentative samples taken by the contestees" as evidence of the amount of oil in gallons per ton of rock on these claims. In his finding 10 Judge Morehouse accepted "the highest assay of record" for each claim in determining whether a discovery had been made. Appellant argues that the sampling technique employed by the contestees was improper. Their method of sampling was described by their senior geologist in charge of the sampling program, who said, "Then [we] took two grab samples from what looked to be the richest oil shale in the exposure, and then cut a channel of varying length vertically across the exposure, so that there were three samples taken" (Tr. 185). (Emphasis by appellant).

Appellant argues that these do not represent the quality of the actual bed of material, but only the richest possible sample, even where only one inch thick. By contrast, says appellant, the samples taken by BLM's mineral examiners were taken of a minable face several feet thick and are representative of the deposit.

Were we concerned here with any mineral other than oil shale, we would agree. There are uncounted administrative and judicial decisions which hold that isolated or high-grade samples which are not representative of the deposit will not serve to prove a discovery. But the rules of law governing oil shale claims, the product of decades of confusion and error, have provided so many unique applications of the 1872 mining law to oil shale claims as to deny comparison with the application of that law to claims for any other mineral. As matters now stand any finding of even "lean" oil shale will serve to effect a "discovery" by geologic inference if the exposure exists "in such situation and such formation that he can follow the vein or the deposit to depth with reasonable assurance that paying minerals will be found." Freeman v. Summers, supra. All that is necessary, then, is that the claimants, prior to February 25, 1920, found exposures of "oil shale" in such geologic circumstances. The quality or quantity is, apparently, unimportant, so long as the rock can properly be termed "oil shale," and is found situated in the requisite geologic circumstances. This is precisely why it was necessary to devise a standard by which "oil shale" could be identified and distinguished from other common rock. Of course, Freeman teaches that even a finding of "oil shale" will not suffice as a discovery if it is merely "an isolated bit of mineral, not connected with or leading to substantial prospective values * * *."

Therefore, we conclude that Judge Morehouse's acceptance of "the richest oil shale in the exposure" was not error, provided that it was properly correlated to the geologic situation within the boundaries of the claim concerned.

[4] The 1930's Assessment Work Contests - Twelve contest proceedings in the 1930's invalidated certain interests in the claims at issue based on nonperformance of assessment work and abandonment. Contestees asserted at the hearing of this case that all of the decisions resulting from those early contests were rescinded by the Department in The Shale Oil Co.,

55 I.D. 287 (1935), and Judge Morehouse so held. In so doing, however, he cited, and disregarded, the more recent Departmental decision on the point, Union Oil Co. of California, 71 I.D. 169 (1964), (Supp.), 72 I.D. 313 (1965).

Contestant/appellant argues that the Union Oil decisions were made by the Solicitor pursuant to the authority delegated to him by the Secretary, and that, therefore, "those decisions are the Department's established legal policy [and] have at least the same weight as a decision of the Board of Land Appeals, and may not be disregarded by Administrative Law Judges."

We agree. Administrative Law Judges are bound by Departmental precedent and may not disregard or overrule it, sub silentio or otherwise. However, it is not apparent that it was Judge Morehouse's intention to overrule the Union Oil decisions. Rather, it appears that he was simply attempting to implement the instructions of Judge Finesilver of the United States Court for the District of Colorado, who has retained jurisdiction of these cases. On page 7 of his decision, Judge Morehouse describes the holdings of Judge Finesilver in Oil Shale Corp. v. Morton, 370 F. Supp. 108 (D. Colo. 1973), which effectively overturned the Union Oil decisions. Nevertheless, Judge Finesilver's decision was vacated by the Court of Appeals. Oil Shale Corp. v. Morton, Order of Remand, Civ. Nos. 74-1344-1347 (10th Cir. Sept. 22, 1975), cert. denied, 426 U.S. 949 (1976). This left the Union Oil decisions intact.

Among his other findings with regard to the efficacy of the decisions rendered in the old contests, Judge Morehouse found that notices of contest proceedings during the early 1930's concerning the Atlas, Camp Bird, Ohio, and Mullins claims were not sent to the post office nearest the land in dispute (Dec. at 17). This aspect was addressed in Union Oil (Supp.), supra, 72 I.D. at 318, where it was held that under the then prevailing rules of practice, such mailing was required only where the land office sought to obtain service by publication, and did not apply when personal service was sought.

Judge Morehouse also held specifically that each co-locator of a claim was an indispensable party, and the failure to serve all such parties in old contests 11759, 11761, 11988 and 12790 caused the decisions in those cases to be "ineffective," because the proceedings should have been dismissed (Dec. at 18). This is directly contrary to the holding in Union Oil (Supp.), supra, at 72 I.D. 315-16, where it was expressly declared that co-locators hold as tenants in common and are, in actions such as these, "necessary parties" rather than "indispensable parties," and rejected the contention that the absence of such a co-owner served to nullify any resulting decision.

Despite our finding that Judge Morehouse erred in failing to conform to established Departmental precedent, as he was bound to do, the Board does not entirely disagree with his conclusions. Specifically, the Board finds that in any contest of the validity of an unpatented mining claim on a charge of non-performance of annual labor, all co-owners must be regarded as indispensable parties. We are persuaded to this view by our recognition of the fact that adequate performance of annual labor by any one co-owner satisfies the statutory obligation of each other co-owner, and benefits and "maintains" the entire claim, regardless of the extent of the interest of the claimant

who actually performs the work. Also, as contestees point out, there is no legal provision whereby the United States may share undivided joint or common ownership of a mining claim, either patented or unpatented, with the remaining private claimants. Applicants for mineral patents are required to show that they possess full record title to the claim. Thus, an unserved co-owner would be severely prejudiced by a rule that allowed the United States to void fractional interests in an association placer claim. Thus, the failure to join any co-owner who might have presented evidence of compliance with 30 U.S.C. § 28 was prejudicial to the interests of all, "leaving the controversy in such a condition that its final determination may be wholly inconsistent with equity and good conscience." Black's Law Dictionary, 913 (4th ed. 1951). Therefore, in those 1930's era assessment work contests where there was an acknowledged failure to serve such indispensable co-owners with notice, the resultant decisions must be regarded as nullities, and we hereby overrule and rescind Union Oil Co. of California (Supp.), 72 I.D. 313 (1965), only to the extent that it is inconsistent herewith.

However, we categorically reject contestees/appellants' argument that all of the 1930's era assessment work contests were nullified in 1935 by the Departmental decision in The Shale Oil Co., supra. While the contest decisions were overruled by that decision, they were not thereby rendered void, and they retained their efficacy in those cases to which they specifically applied. The overruling of a decision in a previous case does not void the effect of the decision in that case, but merely destroys its value as precedent. See Union Oil of California, supra, 71 I.D. at 175; Bohme I, supra, 87 I.D. at 255. See also Gabbs Exploration Co. v. Udall, 315 F.2d 37 (D.C. Cir.), cert. denied, 375 U.S. 822 (1963), where the court gave efficacy to decisions rendered in two such early contests where there was no failure of service, and the contestees did not appeal.

[5] The 10-Acre Subdivision Issue - BLM appeals the finding by Judge Morehouse that three 10-acre subdivisions on the Pollack Nos. 1, 2, and 3 claims are mineral in character. Appellant contends that the Parachute Creek member has been completely eroded from these subdivisions, which apparently is undisputed. Judge Morehouse's holding was based exclusively on the testimony of the contestees' witness, geologist Lou Hamm, who expressed the opinion that "there is a strong possibility there are minable reserves in that area" (Dec. at 25; Tr. 248). Hamm's study of the literature indicated to him "that there are substantial beds of rich oil shale in the Garden Gulch Member which underlie the 10-acre subdivisions in question" (Dec. at 25; Exh. 946). Judge Morehouse added that "assays taken in the general area" showed 18.3 gpt and 10.2 gpt.

Appellant points out that of the eleven samples taken by Hamm, "none was taken on any of the subject 10-acre subdivisions or on any of the three Pollack claims which separate by at least a quarter of a mile the subdivisions from the other claims in these contests." Moreover, appellant argues that "the vast weight of the literature referred to by Mr. Ham * * * is that formations below the Parachute Creek [member] are essentially barren."

The contestees/appellants respond, inter alia, that the entire region was classified as mineral in character by the Department in 1916. We decline to accept a general geological classification of hundreds of square miles in 1916 as controlling of a modern fact-finding procedure concerning the mineral character of specific 10-acre tracts. Were it otherwise, these investigations and procedures would be pointless.

We regard the basis of Judge Morehouse's holding in this particular to be far too speculative, hypothetical and theoretical to support it. See Osborne v. Hammit, 377 F. Supp. 977 (D. Nev. 1964). There well may be "beds" of rich oil shale in the Garden Gulch member, but there is nothing at all to indicate that one or more of such beds underlie these subdivisions. One man's conjecture that "there is a strong possibility" that they exist, when based on nothing more than a study of the literature pertaining to the general area and samples taken at least a quarter-mile away, hardly constitutes a preponderance of evidence sufficient to overcome the contestant's prima facie case. Therefore, the decision below is reversed on this issue.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as modified in part, and reversed in part.

Edward W. Stuebing
Administrative Judge

We concur:

Bruce R. Harris
Administrative Judge

James L. Burski
Administrative Judge